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IN THE

Supreme Court of the United States

RICHARD VIETH, *et al.*,
Appellants,

v.

ROBERT C. JUBELIRER, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

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BRIEF OF *AMICI CURIAE* THE REFORM INSTITUTE, THOMAS MANN, AND NORMAN ORNSTEIN IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

The Reform Institute, Inc. is a not-for-profit 501(c)(3) educational organization representing a thoughtful voice of reform in debates over campaign finance and election administration. Senator John McCain serves as Chair of its Advisory Board. The Reform Institute has three main roles (1) to reduce political corruption and the appearance of corruption; (2) to promote discussion about how best to reform election registration and voting procedures in order to increase meaningful citizen participation in the democratic system; and (3) to promote and defend citizen reform initiatives that seek to open the doors of the voting process. The present case concerns whether a state legislature can redraw congressional districts so as to minimize the likelihood that a particular political party's candidates will win in the election. It directly implicates the Reform Institute's second role of increasing meaningful citizen participation in the democratic system.

Thomas E. Mann and Norman J. Ornstein are political scientists at the Brookings Institution and the American Enterprise Institute, respectively. In their 35-year careers, they have individually and jointly written extensively about Congress, elections, redistricting and American politics and government generally. Active in congressional, election, campaign finance, and other institutional reform efforts, their professional lives have been focused on the health and vibrancy of American political institutions. Their biennial book Vital Statistics on Congress is in its twelfth edition. Their joint AEI/Brookings efforts have included the Renewing Congress Project, Five Ideas for Practical

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[1] All parties consented to the filing of this *amicus* brief with the Court in writings accompanying this filing. No counsel for any party authored this brief in whole or in part and no person or entity other than *amici curiae* or counsel made any monetary contribution to its preparation or submission.

Campaign Reform, the Transition to Governing Project, the Alternatives to the Independent Counsel Project, and the Continuity of Government Commission.

SUMMARY OF ARGUMENT

The Framers envisioned the House of Representatives as a unique structure of the national government. Unlike the Senate, the President, or the courts, it was to have "an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52, at 337 (James Madison)(Robert Scigliano ed., 2001). As John Adams put it, the body of the people's representatives should "be in miniatur[e] an exact portrait of the people at large. It should think, feel, reason, and act like them." John Adams, *Thoughts on Governance*, *in* 4 Papers of John Adams 87 (Robert J. Taylor ed., 1977). With this in mind, the Framers carefully designed the House to "bin[d] the representatives to their constituents ... [and] to extend the influence of the people over their representatives." The Federalist No. 52, at 339. They insisted on direct election "by the People of the several States," a broad franchise, regular reapportionment as among the states, and frequent elections. U.S. Const. art. I, § 2. Of these, the last was the most important, for "without the restraint of frequent elections" in the House, the Framers thought, "[a]ll [other] securities [against oligarchy] would be found very insufficient ...." The Federalist No. 57, at 367. By this device

> the House of Representatives is so constituted to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful

> discharge of their trust shall have established their title to a renewal of it.

Id. Nearly every special feature of the House's design was meant to ensure that it, unlike the other primary structures of the federal government, was highly responsive to public sentiment.

Unfortunately, congressional redistricting has defeated much of the Framers' vision. High rates of incumbent reelection, declining competitiveness of congressional districts, and long periods of one-party control of the House have eroded the accountability and legitimacy of the people's chamber. The 2002 congressional elections make this point starkly. Only four challengers defeated House incumbents—the lowest number in modern American history. Norman J. Ornstein, Thomas E. Mann, & Michael J. Malbin, Vital Statistics on Congress 2003-2004 tbl. 2-10 (forthcoming 2004) (hereinafter Vital Statistics), *to be available at* http://www.aei.org; Michael J. Dubin, United States Congressional Elections, 1788-1997: The Official Results (1988); Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 Election L.J. 179, 182 (2003). Only 43 House incumbents, moreover, won reelection "narrowly"—defined generously as by less than 60 percent of the vote—while 338 House incumbents enjoyed very large victory margins—20 percent or more—including 78 who ran unopposed by a major party challenger. Vital Statistics, *supra*, at tbl. 2-12. In the nation's largest state, California, not a single challenger in the general election received as much as 40 percent of the vote. Hirsch, *supra*, at 182. And more than a third of all States sent to Congress *exactly* the same House delegation as before. *Id.*

These facts are particularly striking because the 2002 elections were the first held after the latest reapportionment. Historically, incumbents suffer in such elections. As their old

voters disappear and new voters replace them, incumbents usually find their seats less secure. Their new voters can have quite different interests than their previous constituents. From 1972 to 1992, in fact, House turnover averaged 45 percent higher in immediate post-reapportionment Congresses. These Congresses contained an average of 87 freshmen, while the others in this period contained only 60. *Id.* at 183. In 2002, however, only 54 freshmen were elected to the House—less than half the number elected in 1992. Vital Statistics, *supra*, at tbl. 2-7. In 2002, incumbents had a very easy ride overall. Only 35 incumbents retired (rather than the average of 48 in other recent post-reapportionment Congress); only eight lost in the primaries and only eight lost in the general election, in each case half the time to another incumbent. *Id.* This lack of competition was, moreover, peculiar to the people's chamber. On the same day that less than ten percent of House races were being decided by margins of ten percent or less, nearly half of all gubernatorial and U.S. Senate races were that close. Hirsch, *supra*, at 183. One significant difference, of course, is that no one can gerrymander a statewide district.

Current political conditions have both increased the incentives to gerrymander and exacerbated the democratic pathologies it leads to. Over the last 15 years, American politics on the national level has been subject to a striking paradox: it has become much more competitive at the macro level, when it comes to institutional control, but much less competitive at the micro level, when it comes to individual seats. Recent presidential elections have been very close and the Senate and House have been evenly or very nearly evenly divided. At the same time, the parties in the House have become much more homogeneous and ideologically polarized. Their homogeneity means that the majority party (with near unanimity on critical party matters) can dominate the House more effectively than before even with a small margin. Their polarization, on the other hand, means that the

parties feel the stakes of control are higher. It increases both the costs of losing and the benefits of winning. In an almost evenly split House, where even a small gain in seats can make all the difference, parties will struggle hard however they can for each extra seat.

This struggle, of course, can have some very positive effects. It may lead parties to field more attractive candidates, may engage party members more deeply in party activities, and may cause some voters to become more interested in politics. It has also had, however, some very bad effects. In particular, it has led parties to draw congressional districts to give their House candidates an artificial competitive advantage. The strategies are as simple as the stakes are high. In states in which the redistricting power is divided, bipartisan gerrymanders are constructed to create ever safer districts while maintaining the partisan status quo. In states with unified party control, the party controlling the redistricting tries to pack as many of its opponent's voters into as few districts as possible, thereby giving its opponent victories in only a few districts but making every victory a landslide. At the same time, the controlling party tries to create comfortably safe, but less than "landslide" safe, districts for its own candidates everywhere else. That way it can send more of its candidates to the House of Representatives. Under either strategy, the overall result is a diminishing number of seats that are in any real or meaningful way competitive in general elections.

This practice undermines the unique role of the House in several ways. First, it weakens the responsiveness and accountability of each elected representative to voters in the district. As the Framers keenly understood, a representative who does not face the regular and effective discipline of the voters cannot be counted on to reflect their views. Second, it makes the House unrepresentative of the people overall. Making individual seats safe for one party means that the

House fails to respond well to changes in underlying public sentiment as the Framers intended. Unless voters' attitudes change dramatically, control of the House will not change at all even though it and the country are nearly evenly divided. Even worse, voters' attitudes can change sharply—leading, say, to a national swing of five percent—and see little impact on House elections when only a tiny fraction of seats are within a five percent margin of change. Third, it can effectively skew representation away from an overall constituency. If the only meaningful electoral challenge that can take place is in a party primary, a representative may be acutely responsive to the faction of ideological activists who regularly populate party primaries and largely unresponsive to the views of the average voter in the district. Centrist voters of both parties are thus artificially silenced and the House as a whole becomes even more polarized than before, which, in turn, encourages further partisan gerrymandering. The result is a vicious cycle leading to ever more frequent and more severe gerrymandering and worsening polarization in the House.

All this, of course, undermines the special role the Framers designed for the House of Representatives in our national government. Instead of ensuring that representatives have "an immediate dependence on, and an intimate sympathy with, the people," partisan gerrymandering frees them from that dependence. It allows them greater freedom to pursue others' interests and to "think, feel, reason, and act [*un*]like" the people they represent. The more electoral districts are designed to deaden real political competition, in other words, the less effectively elections operate to discipline the people's representatives and ensure that the House as a whole remains truly representative.

ARGUMENT

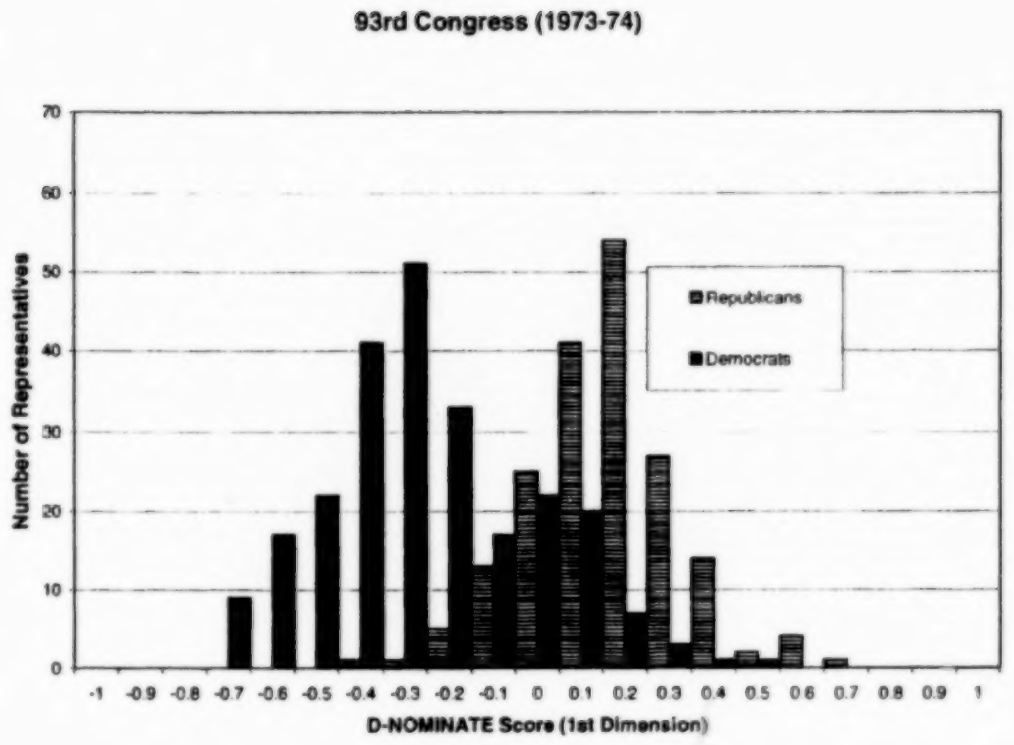
I. UNPRECEDENTED PARITY BETWEEN THE TWO MAJOR PARTIES ON THE NATIONAL LEVEL HAS CREATED GREAT PRESSURE TO MAKE INDIVIDUAL HOUSE DISTRICTS SAFE FOR ONE MAJOR POLITICAL PARTY OR THE OTHER.

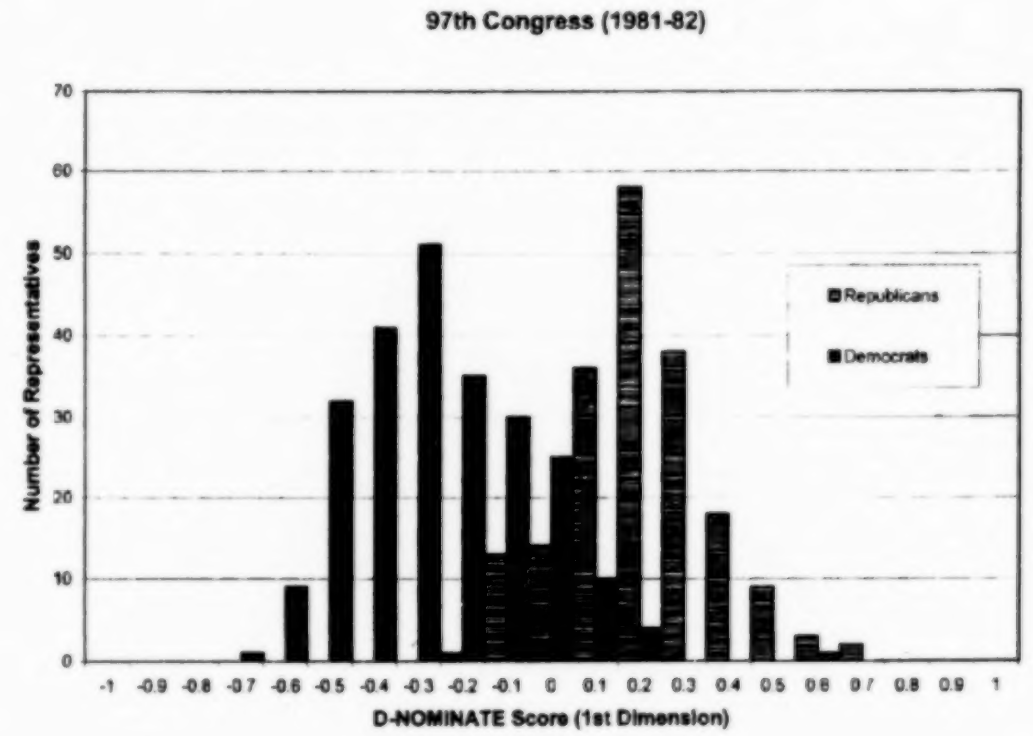
A. The Near Equal Division of the House of Representatives, Its Widening Ideological Polarization, and the Increasing Homogeneity of Each of the Two Major Parties Mean That a Small Change in House Seats Matters Much More Than Before.

As the 2000 elections showed, the two major parties enjoy nearly equal popular support across the nation as a whole. While one presidential candidate won a plurality of votes, the other won a victory in the Electoral College; the Senate became split exactly in two; and the majority party's control of the House stood on an extremely slim margin (221-212). Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 Pol. Sci. Q. 5 (2001). In terms of popular support, the two major parties were more evenly matched than anytime since the nineteenth century. *Id.* at 6. And although the midterm elections of 2002 increased the size of the ruling party's margin in the House by six seats, that margin still stood near its modern low. The 2002 elections culminated a decade-long trend. The *largest* margin of majority in the House since 1992 was less than one-third the historical average from 1960 until 1992, and the average margin for the last ten years is barely one-sixth of the average for the preceding period. *See* Brief of Bernard Grofman and Gary C. Jacobson as *Amici Curiae* at 4 fig. 1. By any standard—historical or absolute—the margin of control in the House has been astonishingly narrow over the past ten years.

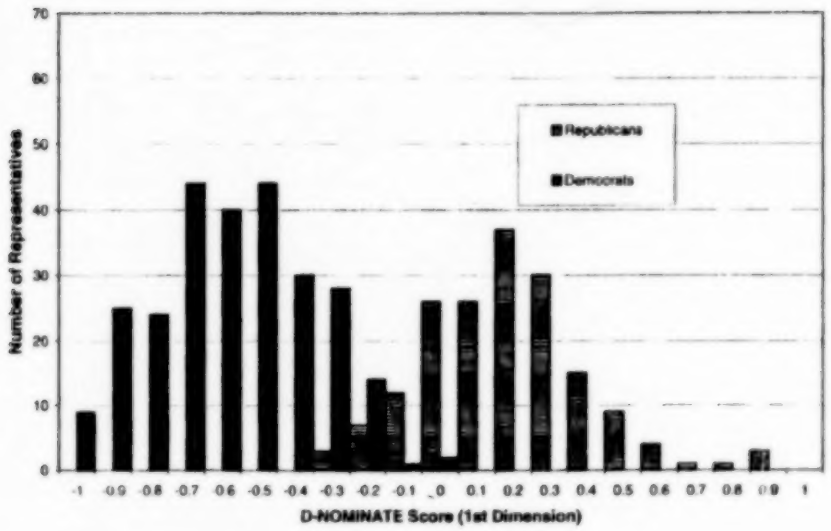
At first that might appear a good thing. After all, small margins of control might be thought to force the parties to cooperate, solve problems together, and allow some of their more centrist representatives a greater voice. But for two reasons exactly the opposite is true. First, the major parties in the House have become increasingly polarized. Gary C. Jacobson, The Politics of Congressional Elections 242-50 (5th ed. 2001). Poole-Rosenthal DW-Nominate Scores, a widely accepted measure of congressional ideology, show how markedly the parties have diverged over the last thirty years. *See* Keith T. Poole & Howard Rosenthal, Congress: A Political-Economic History of Roll Call Voting chs. 2-4 and App. A (1997)(explaining and justifying measure). These scores place each member of Congress on a liberal-conservative scale from -1.0 (liberal) to 1.0 (conservative) on the basis of nonunanimous roll call votes. From the early 1970s on, the average scores for members of the Democratic and Republican parties have steadily and radically diverged. *See* Brief of Bernard Grofman and Gary C. Jacobson as *Amici Curiae* at 11 fig. 6. In fact, the score gap nearly doubled over that time and now amounts to over .86 points on just a 2-point scale. *Id.* at 9.

Second, the major parties in the House have become much more homogeneous. There is now much less divergence than before *within* each party. As comparison of the figures below show, not only have both parties in the House shifted more towards the extremes, leading to less overlap in their policy positions, but each party has a much more cohesive focus than before.

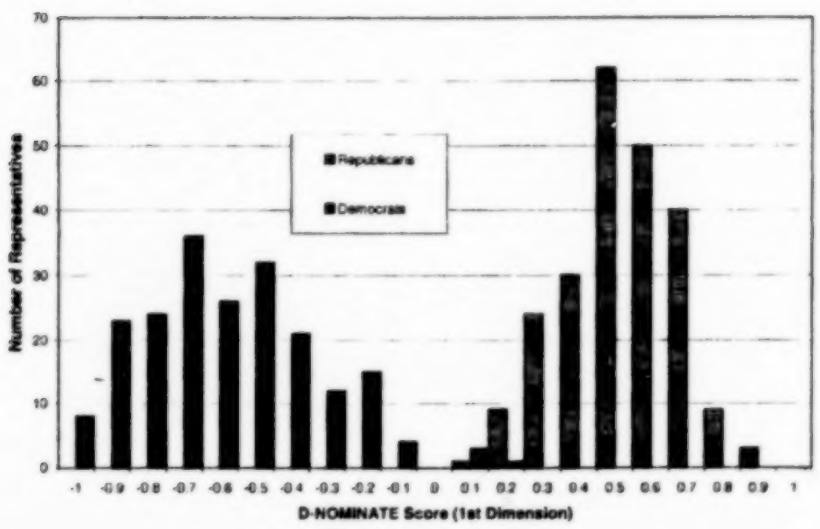




101st Congress (1989-90)



105th Congress (1997-98)



Jacobson, The Politics of Congressional Elections, *supra*, at 246-47 figs. 8-4A-4D. In other words, the two major parties in the House have become increasingly discrete and insular. On policy, they are both more distant from each other and more internally homogeneous than before.

In such a world, small differences matter. The vanishingly narrow margins of control over the past ten years mean that a gain of just a few seats can completely switch party control of the House. From the 1970s through the early 1990s, for example, changes of up to 25 seats in any election would have made no difference to which party controlled the House. After 1992, however, a difference of as few as six seats and at most 13 would have made all the difference. The increasing homogeneity of each party over that same time, moreover, means that the party in control now has a greater focus and has to worry less about its individual members deviating from its preferred policy positions. The increasing polarization sharply raises the stakes of House control for each side. Since larger policy differences separate the parties, which one controls has a greater effect on legislative policy outcomes. In the 1970s, when less distance separated the two parties and they were less homogeneous, which one controlled the House mattered less because the policy outcomes sought and produced under one party would have been more similar to those sought and produced under the other. Once the parties' policy preferences markedly diverged and party members in the House voted more in lockstep than before, however, the policy stakes greatly increased. Because of their ideological polarization, each party wants more extreme policies than before and, because of homogenization, the party in control finds it much easier to achieve its preferred policies even with a small margin. Thus, the stakes of redistricting have grown in two mutually reinforcing ways: narrow margins of control have meant that differences in just a few seats can change which party controls the House and a difference in party control makes a much larger difference in legislative policy outcomes. Shifting fewer seats produces larger legislative payoffs than before.

The parties understand this. In recent years, congressional redistricting battles in the states have become nastier and more pitched. The stakes are so high, in fact, that national

party leaders from Washington have often led the battles. Most recently, for example, the Majority Leader of the United States House of Representatives has pushed Texas state legislators to draw a new congressional map even though the existing plan is only one election old and the courts have approved it. *See Balderas v. Texas*, 536 U.S. 919 (2002) (affirming unpublished opinion of 3-judge court). His reason, stated publicly, was clear and simple: "I'm the majority leader, and we want more seats." David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. Times A1 (July 1, 2003). The attempt has produced such bitterness, however, that state representatives of the minority party have repeatedly decamped the state in order to deprive one house or the other of the state legislature the two-thirds quorum necessary to pass a new plan. The senate representatives are currently sojourning in New Mexico. *Texas Democrats Are Fined by G.O.P.*, N.Y. Times A9 (Aug. 15, 2003)("Eleven Democrats have stayed at a hotel in Albuquerque since July 29, keeping the Texas Senate Republican majority from obtaining the quorum it needs to consider a Republican redistricting plan.").

In response, not only has the Texas Department of Public Security sought to arrest and return the minority party representatives to the statehouse but representatives of the United States House Majority Leader have pressed several different instrumentalities of the federal government, including the Department of Justice and the Federal Aviation Administration, to help in the effort. Counsel to the United States House Majority Leader, for example, called the Department of Justice and asked if it had the legal authority to assist in forcing the return of the minority party state legislators to Texas. Office of the Inspector General, Department of Justice, An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators 4-6 (Aug. 12, 2003) [hereinafter DOJ Investigation], *available at* http://www.usdoj.gov/oig/special/

03-08a/final.pdf. Late the day before a senior staffer for the United States Majority Leader called the Federal Aviation Administration's Administrator for Government & Industry Affairs asking for the current and past location of the plane of the former Speaker of the Texas House, which the staffer hoped might lead to the missing members. Statement of Hon. Kenneth M. Mead, Inspector General, U.S. Department of Transportation, Federal Aviation Administration Efforts to Locate Aircraft N711RD (July 15, 2003)(testimony to House Committee on Transportation and Infrastructure), *available at* http://www.oig.dot.gov/show_pdf.php?id=1127. That same day the Texas Department of Public Safety contacted the federal Air and Marine Interdiction Coordination Center (AMICC), an arm of the United States Department of Homeland Security, asking it to locate an aircraft transporting Texas state legislators. Office of Inspector General, U.S. Department of Homeland Security, Report of Investigation IN03-OIG-0662-S, at 1, *available at* http://www.dhs.gov/interweb/assetlibrary/DHS_OIG_Investigation_Texas.pdf. Employees at all three federal agencies spent time on these requests. The FAA and the AMICC gave state police officials or representatives of the United States House Majority Leader information on the location of the plane. The Department of Justice, after much internal consultation, did ultimately refuse to aid in the return of the errant Texas legislators. One Justice official aptly described the request from the U.S. Majority Leader's office as "wacko." DOJ Investigation, *supra*, at 5. So great is the pressure to gain seats that both federal and state political officials attempted to enlist the power of law enforcement and national security agencies for partisan ends. This politicization of the rules of the game severely damages the legitimacy of our democratic process.

B. The Increasing Pressure to Gain Seats Has Led to Making House Districts Uncompetitive in a Way That Favors One Party.

To gain seats through redistricting requires a party in control of the redistricting process in individual states to follow only a simple strategy: that party must make its opponent's districts as few and its own as many as possible. To minimize the number of its opponent's districts, the party in control must pack as many of its opponent's voters as possible into each district the opponent controls. This leads to the opposition party winning few districts but winning each by a landslide. To maximize the number of its own districts, by contrast, the controlling party must assign as few of its own voters to as many districts as it can while maintaining a reliable majority in each of them. This leads to the controlling party giving itself a comfortable but less sizeable margin in as many districts as possible. The strategy thus aims to make virtually every district uncompetitive and achieves its partisan ends by making the districts differentially uncompetitive for each party. By creating super-safe districts for the opposing party and merely safe districts for itself, the controlling party "wastes" minority party votes and efficiently deploys its own. Knowing that "one person, one vote" and race are virtually their only legal constraints, party strategists feel free to draw such lines.

An extreme example demonstrates these possibilities. Imagine a jurisdiction with 100 voters, four seats, and two parties, one of which claims 60 percent of the voters and the other 40 percent. If the voters are uniformly distributed across the jurisdiction, the majority party will necessarily win every seat so long as the districts are drawn contiguously. A uniform distribution of voters ensures that no matter how the jurisdiction draws its districts three majority party voters will accompany every two minority party votes. The only possible way to create a seat for the minority party would be to district noncontiguously on some basis where the voters

were not uniformly distributed by party. If party affiliation varied roughly according to economic status, for example, non-geographic districts defined by ranges of wealth could permit the minority party to capture one seat. But, of course, such districts are only a theoretical possibility in our political system.

If the state legislature had complete freedom in assigning voters to districts and knew how individual voters voted, many results are possible. It could randomly assign voters to districts, for example, in which case each of the four districts would contain roughly 60 percent majority party voters and the majority party would win every district. At the other extreme, the legislature could split all the minority party voters evenly among three arbitrary districts. In such a scheme, the minority voters would have a bare majority in the first three districts while the majority party would have nearly a 100% majority in the fourth.[2] Although the majority party would win by much more in the single district it controlled, it would lose three to one in the legislature itself. By differentially distributing party voters across districts, in other words, the legislature would be able to leverage a 40 percent party minority in the electorate into a 75 percent party majority in the legislature. At the extremes, the legislature could lock the minority party out completely, as in the random districts, or it could lock the majority party into a 25 percent minority position. If the parties were completely polarized and homogeneous, moreover, a 25 percent minority

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[2] A state legislature would usually, of course, be interested in boosting the representation of the majority party since the majority party would usually control it. If the present minority party had previously enjoyed control of the legislature and gerrymandered state legislative districts to favor its own candidates, however, it could still control the legislative process despite its minority status and then draw lines to give a majority of a state's congressional seats to minority party candidates. Gerrymandering on the state level can thus induce and compound democratic pathology at the level of the House.

would be completely powerless in the legislature. The 75 percent majority would always get its way. At either extreme and in most places in between, for that matter, the legislature's ultimate policy outcomes would reflect less the underlying policy preferences of voters, which would not vary, than how voters were assigned to districts. In a real sense, the people's representatives would reflect the districts of the people rather than the people of the districts.

A party, of course, will usually want to reach no further than it can reliably grasp. Otherwise, a small shift in public opinion can cause its gerrymandering to backfire. *See* Bruce Cain, The Reapportionment Puzzle 151-59 (1984)(explaining how a party that cuts its margins too thin can lose many seats if voter support changes). To prevent this, a party in control of redistricting can be expected to give itself more than a thin margin of victory in its districts and may sacrifice a seat or two in order to ensure that it will continue to dominate its remaining districts if voter sentiment shifts somewhat in the later years of the reapportionment cycle. This strategy deadens competition in nearly every district. The party-victim of the gerrymander will enjoy wins in as few districts as possible but in each by a landslide while the party in control of the gerrymander will enjoy wins in a disproportionately large number of districts but by smaller margins. Few, if any, districts will remain in true competition.

Examples as extreme as those in the above hypotheticals are admittedly rare. In some states, redistricting power is divided between the parties, often producing bipartisan gerrymanders which maintain the partisan status quo while creating safer seats for both parties. Even with unified party control, legislatures do not have complete flexibility in assigning voters to districts. If only to avoid public backlash, they must pay some respect to geography and often as well to political subdivisions and communities of interests. Looking to these other concerns will temper what a state legislature can do, if only a little. More importantly, until recently state

legislatures could not so effectively gerrymander because in many instances they could not accurately predict voting behavior. Above all else, partisan gerrymandering depends on the ability to predict how different groupings of people will vote. If a legislature cannot tell whether drawing districts one way rather than another will help or hurt a particular party, it will not be tempted to gerrymander. As voting behavior becomes predictable, however, partisan gerrymandering becomes possible, powerful, and common.

Although technology has improved redistricters' ability to predict the partisan effects of various plans, the greatest improvement in prediction has come from changes in voting behavior itself. District-level voting behavior is more consistent now than it has been for many years. In the 2002 midterm congressional elections, in fact, fewer congressional districts had split preferences—voting for candidates of different parties for the House and presidency—than in any election in over 50 years. *See* Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 Pol. Sci. Q. 1, 12 (2003). In only 62 House districts did voters not elect a representative from the same party for which they voted for President two years before. *Id.* This increasing district-level consistency parallels a trend in individual voting behavior: the decline of split-ticket voting. From 1972 to 1996 the percentage of voters splitting tickets between presidential and senate candidates has dropped from 28 to 15 percent. Gary C. Jacobson, The Politics of Congressional Elections 149 fig. 6-2 (5th ed. 2001). Such increased individual consistency allows those redistricting to predict much more accurately the partisan effects of their line-drawing. By understanding how individual precincts voted in the last presidential election, they can more reliably predict how those precincts will vote in future congressional elections and use this information to strategically aggregate precincts to provide majorities of the "right" size to each party.

II. ADVANTAGING ONE PARTY BY MAKING HOUSE DISTRICTS UNCOMPETITIVE UNDERMINES THE UNIQUE ROLE OF THE HOUSE OF REPRESENTATIVES IN AMERICAN GOVERNMENT.

A. By Deadening Competition in House Districts, Partisan Gerrymandering Dangerously Weakens the Responsiveness and Accountability of Representatives to Voters in Their Districts.

Partisan gerrymandering artificially advantages and disadvantages parties by deadening competition in as many districts as possible. Empirical research proves how much this harms the democratic process. As one leading political scientist describes its effects, the latest round of redistricting gave

> marginal incumbents of both parties . . . safer districts. Redistricting gave eight Democratic incumbents who had been representing Bush-majority districts[, districts in which Republican George W. Bush had won the popular vote in the 2000 presidential election,] new Gore-majority districts,[districts in which Democrat Al Gore had won the popular vote in that election]; only one suffered the contrary switch . . . . All thirteen of the switches involving Republican incumbents were from Gore- to Bush-majority districts. Of the twenty-five districts Republicans had won in 2000 with less than 55 percent of the major party vote, eighteen were strengthened by increasing the proportion of Bush voters; of the nineteen similarly marginal Democratic districts, fifteen were given a larger share of Gore voters. Thus, three quarters of the marginal districts were made safer by redistricting, half of them by more than [two] percentage points (in presidential vote share). If analysis is confined to districts with marginal incumbents who sought reelection in 2002, thirty-two of their forty districts (80 percent) were made safer by redistricting.

Gary C. Jacobson, *Terror, Terrain, and Turnout*, *supra*, at 10-11. In individual states, the effects could be even more extreme. Gerrymandering in California after the last census, for example, left not a single one of the state's 53 House districts competitive. *Id.* at 10.

Long term trends exacerbate this problem. Since at least the mid-twentieth century, competitiveness in House districts has markedly declined. In the decade of elections after the 1960s reapportionment, for example, an average of 73 seats were won with less than 55 percent of the major party vote. In the decade of elections after the 1990s reapportionment, by contrast, that figure fell by more than 10 percent to 65 seats. *See* Brief of Bernard Grofman and Gary C. Jacobson as *Amici Curiae* at 6 fig. 2. More ominously, elections immediately following reapportionment have in recent years nearly always (the 1972 Nixon-McGovern election is the only exception) shown an increase in district competitiveness, but not in 2002. As one commentator has summed up the results appearing in the following table,

> elections held in the immediate aftermath of reapportionment . . . have generated particularly large freshman classes and have returned fewer incumbents than have other elections. On average, more incumbents retire from the House in post-reapportionment election cycles, more are defeated in primaries, more lose in the November general elections, and fewer win landside reelections. . . . [O]n average, since 1972, membership turnover has been about 45% larger in post-reapportionment Congresses, with 87 freshmen rather than 60. If anything, this tendency for greater turnover in post-redistricting election cycles had appeared to be increasing, as the 1992 elections had generated a freshman class with 110 members.

Comparison of the 2002 Election With Elections from 1972 to 2000

Category	*Average "Normal" Election (1974-1980, 1984-1990, 1994-2000)*	*Average Post-Reapportionment Election (1972, 1982, 1992)*	*2002 Election*
Incumbents reelected	375	348	381
By >20 points	297	261	338
By <20 points	78	87	43
Incumbents defeated	21	35	16
In the primary	3	13	8
In the general	18	22	8
Incumbent retirements	37	48	35
New members	60	87	54

Hirsch, *supra*, at 183 & tbl. 1. In the 2002 election, however, the opposite happened. Only 54 freshmen were elected—fewer than average for an ordinary election, far fewer than the average for post-reapportionment elections, and less than half the figure for 1992. This lack of competitiveness was, moreover, peculiar to House elections in 2002. While only approximately nine percent of House seats were decided by margins of ten percent or less, roughly half of U.S. Senate and gubernatorial elections held on that same day were that close. *Id.* at 183.

This fact bodes ill for the rest of the current reapportionment cycle. Since competitiveness typically declines over the course of each cycle, House elections will, if they follow history, become increasingly uncompetitive over the coming decade. In fact, since the 1960s, district competitiveness has on average declined nearly 25 percent from the beginning to the end of each reapportionment cycle. If that historical falloff rate continues—and intercensus districting, like that being tried by Texas and already accomplished by Colorado, which aims to deaden competition in even more districts, can only make it worse—by the end of this redistricting cycle only 36 House seats will be competitive, i.e., won by fewer than 55 percent of the major party vote.[3]

Deadened competition has both individual and aggregate effects. On the individual level, it means that representatives fear less the regular judgment of the voters. The less competitive districts are, the less representatives will fear defeat at the polls and the less responsive they will be to general election voters. A representative who squeaks by will be very sensitive to what constituents want; a representative assured of a landslide less so. Uncompetitive districts, then, weaken the structures of accountability that the Framers believed made members of the House truly responsive to—and thus truly representative of—the people. They substitute responsiveness to party activists and donors for the rigorous discipline that the Framers intended frequent elections to place on members of the House.

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[3] In the 1962, 1972, 1982, and 1992 elections, the first held in those reapportionment cycles, a total of 279 seats were won within this margin. In the 1970, 1980, 1990, and 2000 elections, by contrast, the last held in these cycles, 212 seats were. *See* Brief of Bernard Grofman and Gary C. Jacobson as *Amici Curiae* at 6 fig.2 (supplying figures for each year). The average beginning-to-end falloff rate in this period is thus 24 percent. Applying this figure to the 47 House seats decided within this margin in the 2002 election predicts a decline to only 36 competitive seats in the 2010 elections.

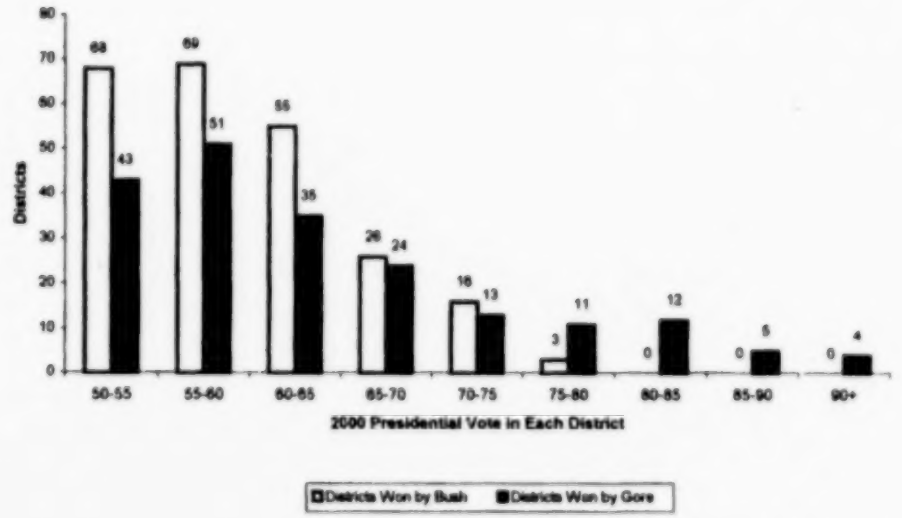
On the aggregate level, deadened competition means that the House of Representatives as a whole will not well reflect changes in sentiment in the voters. Because so few districts can realistically change parties, the House as a whole will fail to track shifts in underlying popular opinion. A national swing of five percent in voter opinion—a sea change in most elections—will change very few seats in the current House of Representatives. Gerrymandering thus creates a kind of inertia arresting the House's dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion and thus frustrates change and creates undemocratic slippage between the people and their government.

B. By Artificially Advantaging One Political Party over Another, Partisan Gerrymandering Can Substantively Skew Public Policy for the Duration of the Reapportionment Cycle.

Although partisan gerrymandering deadens competition within individual districts, that is its method, not its aim. Its aim, of course, is to give one of the major parties an advantage over the other in Congress. Comparing the major parties' shares of the 2000 presidential vote in the pre- and post-reapportionment House districts demonstrates how thoroughly current political gerrymandering has achieved this. As Gary Jacobson has explained, "The Bush-Gore vote division provides an excellent approximation of district partisanship. Short-term forces were evenly balanced in 2000, and party line voting was the highest in decades, hence both the national and district-level vote reflected the underlying partisan balance with unusual accuracy." Gary C. Jacobson, *Terror, Terrain, and Turnout*, *supra*, at 9. In other words, districts won by Democratic candidate Al Gore are generally Democratic while districts won by Republican candidate George W. Bush are generally Republican. As the

following figure shows starkly, the post-census redistrictings helped make many districts comfortably but leanly Republican and many other districts landslide Democratic. The last cycle of redistricting, in other words, made the parties' seats differentially safe in a way that gave one side an artificial edge in the House.

Distribution of Bush Districts and Gore Districts in the 2002 Plans



Hirsch, *supra*, at 197. In fact, all the districts in the country with party landslides of over 80 percent were won by a single party. In some states, of course, Democratic-controlled redistrictings artificially plumped the Democrats' share of the state congressional delegation; in others, Republican-controlled redistrictings artificially plumped the Republicans'. Both sides are guilty of such advantage-taking because the stakes are simply too high. In the 1980s, California Democrats were among the most notorious offenders. *See Badham v. Eu*, 694 F. Supp. 664 (N.D. Calif. 1988)(3-judge court), *aff'd*, 489 U.S. 1024 (1989). In 2003, the Texas Republicans are trying to be. On balance, however, as the figure above shows, the

post 2000 census plans advantaged the Republicans. The net effect was to increase the number of Republican districts by nine, from 228 to 237, Gary C. Jacobson, *Terror, Terrain, and Turnout*, *supra*, at 9, and perhaps give it control of the House for the remainder of the decade no matter what happens politically in the nation.

Increasingly consistent and predictable voting behavior on the district level, moreover, means that there is little chance that partisan gerrymanders will become self-defeating. Although some have speculated that partisan gerrymandering is a self-limiting enterprise, *see* Cain, *supra*, at 151-59 (arguing that majority parties will be tempted to cut their margins too thin in order to gain as many seats as possible and will be thrown out of power by moderate shifts in voter opinion), evidence from the last redistricting suggests less tradeoff between partisan gains and safe seats. Indeed, the more reliably voter behavior can be predicted, the smaller the margins of victory redistricters can employ without having to worry that their plans will later backfire. Furthermore, the new-found eagerness of some state legislatures, like Texas and Colorado, to redistrict between censuses in order to give the majority party's congressional candidates further advantage—actions unprecedented since the reapportionment revolution began in the 1960s—shows that legislatures can recalibrate plans to ensure they never backfire. If a legislature finds that it cut the majority's party's margins in safe districts too thin in its efforts to capture many seats, it can—if the same party still controls the legislature—simply fatten the margins a bit through periodic fine-tuning.

C. Partisan Gerrymandering Artificially Increases Ideological Polarization in the House.

By making individual districts uncompetitive, partisan gerrymandering frustrates the representation of centrist views in the House. Safe districts are drawn to be either more conservative or more liberal than a non-gerrymandered

district would be; their average voter is intended to be reliably off the overall median. Artificially skewing districts in this way is what ensures the election of candidates from particular parties. But that makes it less likely that candidates reflecting the views of these median voters will be elected anywhere. In advantaging one political party, then, partisan gerrymandering not only (1) disadvantages the other major political party and (2) makes districts uncompetitive, but also (3) makes more difficult the representation of views from the center.

Another feature of gerrymandering exacerbates this problem. Deadening competition between the major parties shifts any real political competition in the district into one party's primary, where ideological activists dominate. David Brady & Morris Fiorina, *Congress in the Era of the Permanent Campaign*, *in* The Permanent Campaign and Its Future 134, 135-36 (2000). Centrist candidates of both parties have trouble surviving in safe districts because in the primaries they must appeal to a group of voters representative neither of the district as a whole nor of even the party as a whole but only of the majority party's most intense members. More sharply ideological candidates appeal to this primary electorate. Democratic primary voters vote for more left-leaning candidates than the average Democrat, let alone the average voter, would and Republican primary voters vote for more right-leaning candidates than the average Republican or average voter would. As a result, districts elect candidates more extreme than the voters and the House has become bipolar even though the country has stayed largely in the middle. Making districts safe thus silences the vital center. Unlike the Framers' vision, a gerrymandered House reflects not popular sentiment in all its diversity but the sentiment of one extreme or the other in districts across the country. And that is not the worst. Just as polarization within the House is one of the primary effects of partisan gerrymandering, it is also one of the primary causes. As discussed previously, *supra*, at 11, polarization of a nearly evenly split House

greatly raises the stakes of redistricting and so increases the incentives to gerrymander, which in turn leads to further polarization in the House. Far from limiting itself, under these conditions, partisan gerrymandering is self-intensifying. Polarization and partisan gerrymandering form a vicious circle where increases in one increase the likelihood of the other. Together they ensure the defeat of the Framers' clear vision of the House.

CONCLUSION

Amici agree with Appellants' arguments on the law. For the reasons stated in Appellants' brief on the merits and for the reasons stated here, Amici stongly believe that this Court should develop workable standards to discipline egregious forms of partisan gerrymandering. According, Amici respectfully urge this Court to reverse the judgment of the district court and remand the case for further proceedings.

Respectfully submitted,

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